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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. STEPHON RYAN JONES, Defendant and Appellant.	F076611 (Super. Ct. No. F09500562) **OPINION**

THE COURT[*]

APPEAL from a judgment of the Superior Court of Fresno County. Don Penner, Judge.

Michael L. Pinkerton, under appointment by the Court of Appeal, for Defendant Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Lewis A. Martinez and Louis M. Vasquez, Deputy Attorneys General, for Plaintiff and Respondent.

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[*] Before Poochigian, Acting P.J., Detjen, J. and Meehan, J.

Appellant Stephon Ryan Jones appeals from the trial court's denial of his petition pursuant to Proposition 64 to reduce to a misdemeanor his conviction for possession for sale of marijuana (Health & Saf. Code, § 11359).[1]

On appeal, Jones contends the court erred in denying his petition. We affirm.

FACTS

On December 23, 2009, Jones pled no contest to possession for sale of marijuana and admitted that he had a prior strike conviction (Pen. Code, § 667, subds. (b)-(i)) based on his prior conviction for rape of an intoxicated person.

On January 25, 2010, the court sentenced Jones to a prison term of two years eight months.

When Jones committed his possession for sale of marijuana offense and when the court sentenced him, that offense could only be punished as a felony pursuant to section 11359. (Stats. 1976, ch. 1139, § 73, p. 5082.) However, on November 8, 2016, the electorate passed Proposition 64 (the Control, Regulate and Tax Adult Use of Marijuana Act), which became effective the next day. Proposition 64 amended section 11359, in pertinent part, to make possession for sale of marijuana in some instances a misdemeanor, and in other instances, such as when a defendant is required to register as a sex offender, a wobbler, i.e., an offense that can be punished alternately as a misdemeanor or a felony. (§ 11359, subds. (b) & (c).) Proposition 64 also added section 11361.8 which under certain circumstances allows persons convicted of a felony violation of section 11359 to petition to have the conviction dismissed. (§ 11361.8, subd. (a) & (e).)

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[1] All further statutory references are to the Health and Safety Code, unless otherwise indicated.

On August 11, 2017, Jones filed a petition pursuant to section 11361.8 for "resentencing, dismissal, or reduction" of his conviction for possession for sale of marijuana.

On August 25, 2017, the prosecutor filed an opposition to the petition, arguing that the court should deny the petition because Jones posed an unreasonable risk of danger based on his prior criminal record, including his conviction for rape of an intoxicated person, for which he was required to register as a sex offender, and his subsequent conviction for failing to register.

On October 4, 2017, Jones filed a reply to the prosecutor's opposition, arguing that his dangerousness was not an issue because that standard applied to a petitioner who was currently serving a sentence. (See § 11361.8, subds. (a) & b).) He also conceded that because his prior rape conviction required registration as a sex offender, his possession for sale of marijuana conviction could be punished as a felony or a misdemeanor pursuant to section 11359, subdivision (c)(1). However, he contended he was entitled to relief because the prosecution did not meet its burden of proving that his possession for sale of marijuana offense would not have been reduced to a misdemeanor.

On November 16, 2017, at a hearing on Jones's petition, after the parties stipulated that Jones had a prior rape conviction pursuant to Penal Code section 261, subdivision (a) and that he was required to register pursuant to Penal Code section 290, the court denied the petition stating:

> "I'll confess this is a little strange for the court. I do think the court has—would have the discretion today to make the case a misdemeanor, I acknowledge that, but there's also the issue of the facts as they existed at the time the offense was committed and I'm denying the motion … for all of these reasons. The defendant was on parole at the time of the date of the violation in this case, he tried to conceal the contraband by placing it in his grandparent's room, he has a prior conviction on that date for a crime of violence, [Penal Code, section] 273.5 or domestic violence[,] I should say[,] as a misdemeanor. He also had a prior felony conviction for Penal

Code [s]ection 290, failing to register. Given those factors, I'm not inclined to reduce it to a misdemeanor and the motion is denied…."

DISCUSSION

Section 11361.8, in pertinent part, provides:

"(e) A person who has completed his or her sentence for a conviction under Sections … 11359, … whether by trial or open or negotiated plea, *who would not have been guilty of an offense or who would have been guilty of a lesser offense* under the Control, Regulate and Tax Adult Use of Marijuana Act [Proposition 64] *had that act been in effect at the time of the offense,* may file an application before the trial court that entered the judgment of conviction in his or her case to have the conviction dismissed and sealed because the prior conviction is now legally invalid or redesignated as a misdemeanor or infraction in accordance with Sections … 11359, … as those sections have been amended or added by that act. (Italics added.)

"(f) The court shall presume the petitioner satisfies the criteria in subdivision (e) unless the party opposing the application proves by clear and convincing evidence that the petitioner does not satisfy the criteria in subdivision (e). Once the applicant satisfies the criteria in subdivision (e), the court shall redesignate the conviction as a misdemeanor or infraction or dismiss and seal the conviction as legally invalid as now established under the Control, Regulate and Tax Adult Use of Marijuana Act."

Jones contends that all he had to show to be entitled to relief pursuant to section 11361.8 was that he was convicted of violating section 11359 and he was no longer serving a sentence for that offense. Therefore, according to Jones, since he "satisfied all conditions for relief[,]" the court erred when it denied his petition. Jones is wrong.

As noted earlier, "[s]ection 11361.8[,] [subdivision] (e), which was added by Proposition 64 [in November 2016], permits a person convicted of specified marijuana-related offenses, including possession for sale, to apply to have a felony conviction redesignated a misdemeanor or infraction." (*People v. Medina* (2018) 24 Cal.App.5th 61, 65 (*Medina*).)

"Whether defendant's conviction rendered him eligible for reduction under section 11361.8[,] [subdivision] (e), presents a question of statutory interpretation, which we review de novo." (*Medina*, *supra*, 24 Cal.App.5th at p. 66.)

For section 11361.8, subdivision (e) to apply to Jones there were two requirements, not one, as Jones contends. In addition to having completed his sentence, Jones's "eligibility for reduction turn[ed] on whether he [was] a person who 'would not have been guilty of an offense or who would have been guilty of a lesser offense under [Proposition 64] had that act been in effect at the time of the offense.' " (*Medina*, *supra*, 24 Cal.App.5th at p. 66.)

Section 11359, in pertinent part, provides:

> "(b) Every person 18 years of age or over who possesses cannabis for sale shall be punished by imprisonment in a county jail for a period of not more than six months or by a fine of not more than five hundred dollars ($500), or by both such fine and imprisonment.
>
> "(c) Notwithstanding subdivision (b), a person 18 years of age or over who possesses cannabis for sale may be punished by imprisonment pursuant to subdivision (h) of Section 1170 of the Penal Code if:
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> "(1) *The person has one or more prior convictions* for an offense specified in clause (iv) of subparagraph (C) of paragraph (2) of subdivision (e) of Section 667 of the Penal Code or *for an offense requiring registration pursuant to subdivision (c) of Section 290 of the Penal Code*;"[2] (Italics added.)

"A felony is a crime that is punishable with death, by imprisonment in the state prison, or notwithstanding any other provision of law, by imprisonment in a county jail under the provisions of subdivision (h) of [Penal Code] [s]ection 1170.[3] Every other

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[2] Penal Code section 290, subdivision (c) requires any person convicted of the crimes enumerated in that section, including violations of Penal Code section 261, to register as a sex offender.

[3] Penal Code section 1170, subdivision (h), in pertinent part, provides: "(1) Except as provided in paragraph (3), a felony punishable pursuant to this subdivision where the

crime or public offense is a misdemeanor except those offenses that are classified as infractions." (Pen. Code, § 17, subd. (a).) A "wobbler" is an offense that can be alternatively punished as a felony or a misdemeanor. (*Medina, supra,* 24 Cal.App.5th at p. 64.)

In 2009, when Jones was convicted of possession of marijuana for sale, a violation of section 11359 was a straight felony because that statute provided for punishment only in prison. (Stats. 1976, ch. 1139, § 73, p. 5082, operative July 1, 1977.) As amended by Proposition 64, section 11359 made possession for sale of marijuana a wobbler for defendants who, like Jones, were required to register as sex offenders because it provided for alternate punishment as a felony or a misdemeanor for those defendants. (§ 11359, subd. (c).) However, " 'a "wobbler …" is deemed a felony unless charged as a misdemeanor by the People or reduced to a misdemeanor by the sentencing court under [Penal Code] [section 17 [subdivision] (b)].' " (*Medina, supra*, 24 Cal.App.5th at p. 66.) Therefore, Jones would not have been guilty of a lesser offense by the mere application of Proposition 64 because he would still have been guilty of a felony, not a lesser offense.

The permissive language in section 11359, subdivision (c), i.e., "may" suggests that in ruling on Jones's petition the court had discretion in determining whether to reduce Jones's offense despite his prior conviction requiring sex offender registration. The trial court, however, declined to exercise its discretion and Jones does not challenge that aspect of the court's ruling. Thus, we conclude that the court did not err when it

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term is not specified in the underlying offense shall be punishable by a term of imprisonment in a county jail for 16 months, or two or three years. [¶] (2) Except as provided in paragraph (3), a felony punishable pursuant to this subdivision shall be punishable by imprisonment in a county jail for the term described in the underlying offense. [¶] (3) Notwithstanding paragraphs (1) and (2), where the defendant … is required to register as a sex offender pursuant to Chapter 5.5 (commencing with Section 290) of Title 9 of Part 1, … an executed sentence for a felony punishable pursuant to this subdivision shall be served in the state prison."

denied Jones's petition to reduce his possession for sale of marijuana offense to a misdemeanor.

DISPOSITION

The judgment is affirmed.